
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MARCO ANTONIO LOPEZ-HERNANDEZ,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

NO. 21,750 ✓

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

**I.
JURISDICTIONAL STATEMENT OF FACTS**

This prosecution was begun by the return of an Indictment by the Federal Grand Jury sitting at Phoenix, Arizona, on July 19, 1966, charging Marco Antonio Lopez-Hernandez with a violation of 21 U.S.C. §174 in that on or about the 19th day of June, 1966, within the District of Arizona he did fraudulently and knowingly import and caused to be imported and brought into the United States of America from the United States of Mexico, near Nogales, Arizona, approximately 246.6 grams of heroin, a narcotic drug (Record of the Ap-

peal, Item 1). (Hereinafter the Record of the Appeal will be referred to as "RC", the Reporter's Transcript of the Proceedings will be referred to as "RT", the number following RT will refer to the page and the number following "L" will refer to the line; appellant Marco Antonio Lopez-Hernandez will be referred to as Lopez-Hernandez).

On July 25, 1966, Lopez-Hernandez was appointed counsel and was arraigned and pleaded not guilty (RC Item 2).

Trial was set for September 21, 1966, and on that date, September 21, 1966, Lopez-Hernandez by his counsel made an oral motion for a 18 U.S.C. §4244 hearing which was granted. The Government was directed to prepare the Order appointing the expert witness which was entered on September 22, 1966 (RC Item 3).

Lopez-Hernandez filed opposition to the form of the order on September 29, 1966 (RC Item 4).

On October 31, 1966, the Report of the psychiatric examination was filed (RC Item 6).

Trial was re-set for November 17, 1966, and trial was held on November 17 and 18, 1966, the Honorable William P. Gray presiding (RC Item 7 & 8). The jury returned a verdict of guilty (RC Item 8).

On December 27, 1966, a Judgment of conviction was entered, and Lopez-Hernandez was sentenced to seven years, provided five years are served and thereafter Lopez-Hernandez be eligible for parole (RC Item 13).

On January 6, 1967, Notice of Appeal was lodged (RC Item 17). On January 12, 1967, a Motion to Proceed in Forma Pauperis supported by affidavit was filed (RC Items 14 & 15) and on January 20, 1967, the Court entered an Order Granting Leave to Appeal in Forma Pauperis (RC Item 16). On the same day, the Notice of Appeal was filed (RC Item 17).

On March 21, 1967, an Amended Judgment and Commitment was filed reducing the sentence to five years (RC Item 23).

(On January 26, 1967, the Court had entered an Order permitting trial counsel to withdraw, RC Item 20).

This appeal was docketed on March 27, 1967. This Court has jurisdiction of the appeal under the provisions of 28 U.S.C. §1291.

II.

STATEMENT OF FACTS

On June 19, 1966, a Sunday, at about 1:45 a.m. Customs Agents Horace Cavitt and Charles Cameron, Customs Port Investigators Everett Turner and William Searcy with State Agents Leonard Heimer and Edward Cleveland went to a point approximately two miles west of Nogales, Arizona, along the International Boundary between Mexico and the United States, to a point where the International Boundary fence drops from a ten foot high cyclone fence to a four or five strand barbed wire fence (RT 10-11; 30-31;81).

At about 2:00 a.m. Customs Agent Henry Washington drove up and blinked his lights and got out of his car. Washington walked up towards the boundary (RT 12 L 3-6; 32 L 1-3). Washington met Lopez-Hernandez on the American side about 10 feet from the fence (RT 61 L 3-11). They spoke in English (RT 61 L 16-17). There were two men on the Mexican side and one other man who was with Washington on the American side (RT 61 L 25-to 62 L 3). Lopez-Hernandez asked Washington if he had the money (RT 62 L 13-20) and Washington replied, "Yes, I have \$5,000.00" (RT 62 L 20-21 and 63 L 3). ". . . and he said, Mr. Lopez then said, 'We have the best heroin in Mexico.' He said, 'It is eighty per cent pure and at \$500 an ounce it is a bargain.' I then said, 'There is no heroin in Mexico eighty per cent pure.' And then Mr. Lopez laughed and he said, 'You Americans never believe us Mexicans.' And then he said, Mr. Lopez, the defendant said, 'Let's go see the money'" (RT 63

L 3-9). They walked back to Washington's car (RT 12 L 17-20; 32 L 9-11; 63 L 9-10). Washington entered the car, obtained the money from the glove compartment, showed the money to Lopez-Hernandez, returned the money to the glove compartment and locked it (RT 63 L 10-12). They returned to the fence (RT 63 L 12-13; 12 L 20-22; 32 L 18-20). Lopez-Hernandez entered Mexico and spoke to one of the men a few minutes and then came back across the fence (RT 63 L 13-15). A man on the other side said, "Let's see some action" (RT 63 L 16). Then Lopez-Hernandez said, "If you try anything, I have some men up here on the hill" and he pointed towards Mexico, "with guns and they will take care of you" (RT 63 L 17-19). Then Lopez-Hernandez showed Washington a small contraceptive which he opened and had Washington smell it (RT 63 L 20-21). Lopez-Hernandez then tied it back up and they started walking toward the car (RT 63 L 21-23).

In about twenty yards, a twig snapped and Lopez-Hernandez turned his head; a light hit them (RT 63 L 23-25), Washington saw Lopez-Hernandez throw the contraceptive he was holding in his left hand and start running (RT 63 L 25 to 64 L 2). Washington then saw Lopez-Hernandez reach into his right pocket as he was running but Turner's body, who started running after Lopez-Hernandez, got between Lopez-Hernandez and Washington, and Washington could not see any more (RT 64 L 6-10). Cavitt ran to head Lopez-Hernandez off at the fence while Turner directly pursued him (RT 13 L 18-22; L 18 and 34 L 2). Turner tackled Lopez-Hernandez and when Turner picked up Lopez-Hernandez, Turner found an eight or ten inch steak knife under Lopez-Hernandez, which was Government's Exhibit 4 (RT 34 L 9-13). Turner then took Lopez-Hernandez back to Cameron and went to look for the package (RT 34 L 1-4) which Turner had seen him throw to his right after 2 or 3 steps (RT 33 L 24-25; 82 L 12-18 and 46 L 3-4). Turner saw Heimer find

it and took immediate possession of it (RT 37 L 17-19). The package, a plastic bag in Government's Exhibit 2, contained five rubber contraceptives (RT 37 L 15-19). While the agents searched for the package, Washington sat in the car with Lopez-Hernandez and the other man who was with him, and Lopez-Hernandez agreed to pretend the two were wet backs (RT 75 L 20 to 76 L 1).

The agents took Lopez-Hernandez to the office and Washington spoke to them and they went back to search the area where Lopez-Hernandez started running (RT 38, L 8-10). Turner found one single contraceptive (RT 38).

Government's Exhibit 2 consisted of the plastic bag containing five contraceptives and the single contraceptive contained a total of 9.2 ounces or 246.6 grams of heroin (RT 104-105). (The chain of custody from Turner on is not at issue and will not therefore be set out.)

Lopez-Hernandez testified he drove a taxi-cab for a living (RT 118). He testified he had entered the United States many times illegally (RT 119). Lopez-Hernandez testified a Mexican client, who preferred his services, was going to take him to Los Angeles (RT 120 L 15-20). Lopez-Hernandez had known him before in Los Angeles but had seen him in Nogales about a year (RT 121 L 8-9).

Lopez-Hernandez said the Mexican client told him not to bring luggage so that they would not be questioned (RT 121 L 16-20). Shortly after Lopez-Hernandez arrived, a Mexican arrived in a car on the Mexican side (RT 121 L 23-24). Then the Mexican client arrived on the American side in a car and the lights of the car blinked (RT 122). They walked up to the fence and began to discuss a business deal with the other Mexican, not Lopez-Hernandez (RT 123).

Lopez-Hernandez was asked to go check the money with his taxi-cab client (RT 124). Lopez-Hernandez denied selling marijuana or narcotics (RT 127 L 1-3) although he has sold oregano cigarettes to college students (RT 127 L 6-9). Lopez-

Hernandez stated that while they had been talking by the fence the others had talked about heroin and he, Lopez-Hernandez, was given one of the contraceptives to hold but yet he, Lopez-Hernandez, did not bring it with him into the United States (RT 128, L 3-8; 129 L 5-7). During this conversation Lopez-Hernandez stated the Mexican, who had arrived on the Mexican side, accused Washington and the taxicab client of trying to lure the Mexican into the United States (RT 128 L 12-14).

(Lopez-Hernandez therefore testified to only one trip away from the fence.) Lopez-Hernandez stated as he was walking towards the car the light flashed in his face and he started running and made flailing motions with his arms (RT 126 L 25 to 130 L 3).

Lopez-Hernandez stated he asked the person who caught him if he could take the knife out (RT 130 L 9-16) which Turner denied (RT 158 L 17-19).

On cross examination, Lopez-Hernandez denied asking Washington for the money (RT 138 L 21), denied being on the American side of the fence during this conversation (RT 139 L 1-2); denied handing Washington a rubber contraceptive and telling Washington it was 80% pure (RT 139 L 6-8). Lopez-Hernandez was then asked if he could recall his counsel's question about whether he had ever sold narcotics or marijuana to anyone and he did recall it (RT 139 L 9-14). Lopez-Hernandez was asked if he went up to Washington in Nogales, Sonora, Mexico about a week before his arrest and asked Washington if Washington wanted to buy marijuana, pills, heroin, see the girls, "anything you want I can get." (RT 139 L 15-18) and he denied ever making such an offer (RT 140 L 5. He was then asked if he made the same offer to Washington about six months before June 19 in Nogales, Sonora, Mexico (RT 140 L 6-7) and he denied it (RT 140 L 12).

Lopez-Hernandez denied stating to Washington not to

try anything because he had men on the Mexican side who would kill him)RT 140 L 20-22).

Lopez-Hernandez denied throwing away the rubber contraceptive (RT 142 L 16-19) and also denied throwing away the package with the five contraceptives (RT 142 L 22-25).

Washington in rebuttal testified that the first time he saw Lopez-Hernandez was about six months before Lopez-Hernandez was arrested (RT 144 L 9-11). Lopez-Hernandez approached him in Nogales, Sonora, Mexico in front of the Mexican Immigration Building and asked Washington where he was going and Washington ignored him; then Lopez-Hernandez repeated the question he denied asking on cross-examination, i.e. "Do you want to buy some marijuana, you want to buy some pills, you want to buy some heroin, you want to go see the girls, anything you want I have got it." (RT 144, L 20-25).

Washington next testified Lopez-Hernandez next spoke to Washington about a week before the arrest at the same place as before and made the same approach, i.e. do you want to buy marijuana, etc. (RT 145 L 5-20).

Washington testified Lopez-Hernandez was on the American side on June 19 when Washington first approached Lopez-Hernandez and the conversation took place on the American side (RT 145 L 21-24). When Washington opened the door to get the money to show Lopez-Hernandez the car light went on and he saw Lopez-Hernandez clearly (RT 146 L 17-19).

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. The District Court did not err in sustaining the Government's claim of privilege and the Government's objection as to timeliness on the revelation of the informant's identity.

2. The conviction under the indictment was sustained by the weight of the evidence.

IV.

SUMMARY OF ARGUMENT

1. No real grounds were given for the revelation of the informant's identity, that is, revelation was not essential to a fair determination of the cause.

2. Although there was a motion for judgment of acquittal at the close of the Government's case, there was no motion for judgment of acquittal at the close of all the evidence and, therefore, the Appellant has no grounds to attack the sufficiency of the evidence.

V.

ARGUMENT

1. No real grounds were given for the revelation of the informant's identity, that is, the revelation was not essential to a fair determination of the cause.

In discussing the evidence received at trial the Appellant reviews the evidence as if Appellant's testimony was the only evidence received as to the movements by the fence. Turner and Cavitt, as well as Washington testified to two trips to the fence area (RT 32; 12; 63). Lopez-Hernandez testified to only one trip by Washington to the fence area. (Please see Statement of Facts covering Lopez-Hernandez's testimony.)

Lopez-Hernandez was further impeached when he was asked on cross-examination if he had offered narcotics to Wash-

ington on two previous occasions and he denied it. Washington so testified. (Lopez-Hernandez had testified on direct examination that he had never sold narcotics to anyone, RT 127 L 1-3).

Furthermore, in Lopez-Hernandez's Opening Brief, Lopez-Hernandez takes out of context Washington's statement that he was going to take Lopez-Hernandez to Los Angeles. (See Opening Brief of Appellant, page 5 line 24 to page 6 line 1.) Washington testified that while the agents searched for the package, Washington, while purportedly under arrest, and Lopez-Hernandez agreed to a story that Lopez-Hernandez was a wet-back Washington was taking to Los Angeles. (RT 75 L20 to 76 L1; 78 L 12-17).

Obviously, the jury believed the testimony of Washington as to the conversations with him, and the two other agents' testimony as to the movements back and forth to the fence. Further, it is respectfully submitted the evidence on appeal is to be reviewed in a light most favorable to the Government. *Enriquez v. U.S.A.* (9th Cir., 1964) 338 F.2nd 165.

On the second day of trial, November 18, 1966, after one continuance of the trial, September 21, 1966, with no previous motion by Lopez-Hernandez's counsel made requesting for revelation of the informant, Lopez-Hernandez waited until trial to request the revelation of the informant. As was stated by Government's counsel:

"Miss Diamos: I don't see where all of a sudden it is relevant today when Mr. Geyler has had the benefit of the Government's report since the night before the original trial date of September 21st. I submit this is only a means to prolong the trial to get another continuance. This man was present, the defendant, he would know him just as well, his availability would be just the same to the defendant and I don't see why this red herring has to be dragged out. I submit the name of the informer is privileged and further it is not necessary to the defendant's defense and this is rather a late time to be

bringing it up because Mr. Geyler has had my file made available to him since September 20th." (RT 50 L 18 to 51 L4).

Lopez-Hernandez's counsel denied having the Government's file which was not asserted, but admitted the report had been given to him to read on September 20, 1966. (RT 51 L5-8)

The Court then sustained the privilege on the timeliness (RT 51 L 15-18). Lopez-Hernandez's counsel then avowed he would not seek a continuance (RT 51 L 20-22).

In *Ruiz v. U.S.A.* (9th Cir., 1967) 380 F.2d 17 this Court stated at page 18:

"The particular circumstances of this case do not compel disclosure of the identity of the informant. There was no adequate showing that his testimony would have been significant or that the defenses would have been changed or strengthened by knowledge of his identity or his production in court. The trial court's rulings were correct."

It is respectfully submitted there was a fair determination of the cause.

2. The conviction under the indictment was sustained by the weight of the evidence.

Lopez-Hernandez's counsel moved for judgment of acquittal at the close of the Government's case (RT 111-113) which was denied (RT 114).

No motion was made at the close of all the evidence (RT 158), when the instructions were settled (RT 159 to 161) or when the jury retired (RT 176). It is respectfully submitted he has waived the sufficiency of the evidence. *Robbins v. U.S.A.* (9th Cir., 1965) 345 F.2d 930.

Further, in discussing the evidence Lopez-Hernandez ignores Washington's testimony found on pages 63 to 64 of the Reporter's Transcript and Turner's testimony at page 32 and Cameron's testimony at page 81, where Washington describes arriving at the International Boundary, walking up to

the fence, Lopez-Hernandez's crossing the fence into Mexico and Lopez-Hernandez going to the man and staying there a few minutes, and the displaying by Lopez-Hernandez of one contraceptive to Washington, the walk back towards the car, the twig snapping, the flash of light, the swing of Lopez-Hernandez's left hand to the right throwing the single contraceptive, Turner then blocking Washington's view, Turner seeing Lopez-Hernandez reach into his right trouser pocket and tossing something, Cameron seeing a package in the light of his flashlight leave Lopez-Hernandez.

Appellant argues that heroin worth \$350 an ounce in the Mexican side (RT 28) was left lying around in the brush by someone else and was not the package Turner and Cameron saw being tossed by Lopez-Hernandez is straining one's credibility too far.

Further, the chemist brought out the single contraceptive was 50 per cent pure while the other five contraceptives were only 30% pure (RT 104). This would be typical to have the sample, the only heroin to be shown to the prospective buyer, less diluted than the entire amount.

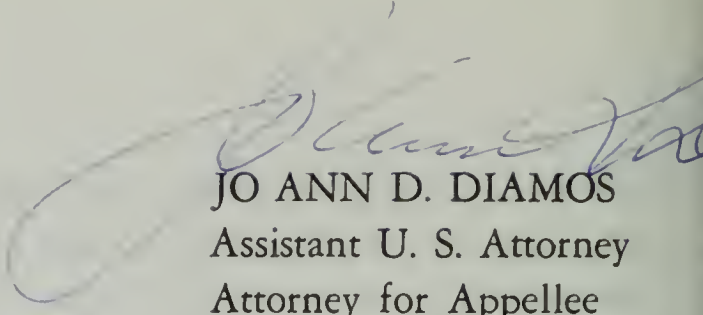
It is respectfully submitted the sufficiency of the evidence has been waived, and even if it had not been, the evidence is sufficient.

VI. CONCLUSION

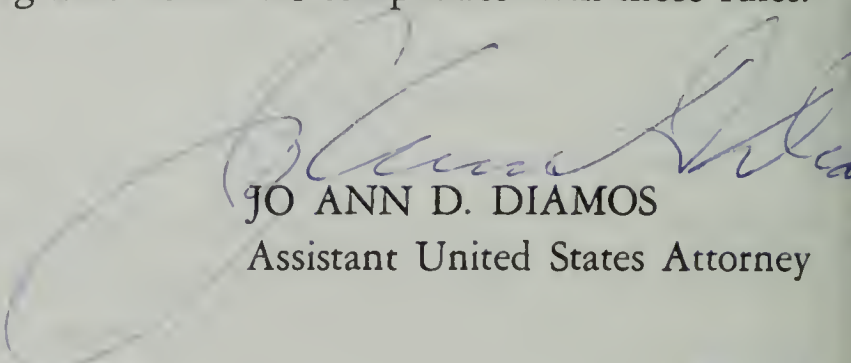
There was no grounds for the revelation of the informant, and, further, the evidence was sufficient.

Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.


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Three copies of the Brief of Appellee mailed this..^{2nd}
day of ~~October~~, 1967, to:
^{November}

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